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December 19, 2002

Ex Parte

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW Portals
Washington, DC 20554

RE: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338

Dear Ms. Dortch:

The attached letter from Herschel Abbott of BellSouth was provided to Chairman Powell today. Please let me know if you have any questions.

Sincerely,

Jonathan Banks

Attachment

cc: Commissioner Abernathy
Commissioner Martin
Commissioner Copps
Commissioner Adelstein
B. Tramont
C. Libertelli
M. Brill
D. Gonzalez
J. Goldstein
E. Einhorn
W. Maher
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December 19, 2002

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

> *In contrast to the initial implementation of the 1996 Act, we now are armed with more than predictive theory in developing our rules. We have nearly seven years of experience. We have seen the criticality of tailoring our policies to respect the capital needs of the market. And we have seen how monumental the impact on our economy is when things go seriously wrong.*
>
> *Government must now approach the review of its regulatory structure with these lessons understood and digested. It can advance and implement a regulatory structure that more faithfully answers more to capital investment, rather than airy political imperatives.*
>
> -M. K. Powell, October 2, 2002

Dear Chairman Powell:

At this late hour in the proceedings of the triennial review, proponents of "untailored" access to ILEC facilities argue that they should be allowed to substitute UNEs provided to enable competition in the local exchange market for services and facilities used to provide long distance and wireless services. However, the recent federal court decisions make clear that the 1996 Act invites a more market- and service-specific impairment analysis that takes into consideration different forms of competition. The "regulatory structure that more faithfully answers more to capital investment, rather than airy political imperatives" that you seek compels this kind of analysis, the law requires it, and the Commission has taken some initial steps in this direction.

The Commission should build on these steps as it completes its triennial review by returning the sole aim and focus of the local market opening provisions of the 1996 Act, and eliminating opportunities for cross-market UNE arbitrage. In doing so, the

Commission can construct "genuine and viable economic and regulatory foundations for communications services, growth and competition." BellSouth's vision of that economic and regulatory foundation follows.

1. UNEs Are for Local Wireline Markets Where an Impairment Determination Has Been Made.

The intent of the 1996 Act was to provide competitive alternatives for basic wireline local exchange service. The Commission's 1999 *Supplemental Order Clarification*, recently upheld by the Court of Appeals, correctly reflects the intent of the statute by imposing "local use restrictions" on unbundled network elements. These restrictions help prevent UNE arbitrage in non-local markets and in the highly competitive wireless industry, thereby somewhat mitigating the over-breadth of the Commission's earlier unbundling decisions, neither of which has survived appellate scrutiny with respect to the fundamental issue of impairment. These restrictions need to be retained as a foundation of the Commission's prospective unbundling policy, along with the Commission's prior recognition of the importance of service-specific impairment determinations.

As the Court of Appeals observed, unbundling "imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[1] The Court of Appeals recently laid to rest any doubt that the Act permits the Commission to undertake a service-specific impairment analysis before mandating the unbundling of a network element for use in the provision of the particular service a requesting carrier "seeks to offer."[2] A regulatory structure that answers to capital investment must necessarily then be targeted to specific services in order to avoid the consequences of an overbroad unbundling policy.

The Commission has already properly noted that it "may consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services."[3] The Commission went on to find that "it is unlikely that Congress intended to compel us, once we determine that a network element meets the 'impair' standard for the local exchange market, to grant competitors access – for that reason alone, and without further inquiry – to that same network element solely or primarily for use in the

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1 *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D. C. Cir. 2002) ("*USTA*").

2 *Competitive Telecommunications Ass'n v. FCC,* 309 F.3d 8, 12-13 (D. C. Cir. 2002) ("*CompTel*").

3 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Supplemental Order Clarification,* 15 FCC Rcd 9587, 9595, ¶ 15 (2000).

exchange access market." [4] The Commission adopted its local use restrictions because that impairment link had not been made, and was immediately challenged.

The Court of Appeals found the Commission's reasoning "compelling," however, and found a direct statutory basis for the Commission's action:

> If Congress had spoken of 'the provision of *any* telecommunication service,' the language might conceivably be taken to suggest that once an element was ordered to be made available for one telecommunications service, it must be made available for all. But the vaguer phrasing chosen by Congress does not lend itself even to that suggestion.[5]

Thus, the Commission's reasoning in adopting its 1999 "local service use restrictions" has been fully vindicated by the *CompTel* and *USTA* courts, and partially answers the Supreme Court's concerns regarding overbroad unbundling in *Iowa Utilities Board*. With this judicial endorsement, the Commission should clarify, as BellSouth suggested in its earlier filed comments,[6] that its previous impairment determinations were made in the context of encouraging facilities-based competition against ILECs in the provision of local exchange service, and that it has made no determination of impairment with respect to the "legally distinct" exchange access or wireless service markets.

In response to follow-up requests by the Wireline Competition Bureau, BellSouth recently showed that a separate impairment analysis is necessary for the special access service market.[7] We demonstrated that Section 251(d)(2), as written and as interpreted by the appellate courts, requires the Commission to undertake a service-specific impairment analysis; that the exchange access market is indeed separate and distinct from the local exchange market; and that network elements that meet the impair standard for the local exchange market may not be accessed for use in the exchange access market without a finding of impairment in the exchange access market, which cannot be made on the record compiled in the triennial review proceeding.[8]

Permitting the substitution of UNEs for special access would directly undermine the Act and the intent of Congress. Both the wisdom and the statutory basis for the Commission's decision not to permit such substitutions have been clearly upheld and

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4 *Id.*, ¶ 14.

5 *CompTel* at 12.

6 *See* BellSouth Comments at 5-6, 28-29 (filed April 8, 2002); BellSouth Reply Comments at 62 (filed July 17, 2002).

7 Letter from W. W. (Whit) Jordan, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 27, 2002).

8 *Id.* at 2-6.

endorsed by the *CompTel* court. For all these reasons, and in order to send the right signals to the capital markets, the Commission should not permit the use of UNEs or UNE combinations by requesting carriers for the provision of special access services. In order to effectuate the appropriate use of UNEs, it must continue to recognize the legal distinctions between the separate local exchange and exchange access markets and maintain the usage restrictions on UNEs obtained to provide local exchange service.[9]

2. *The Commission Should Determine that Carriers Are Not Impaired Without Access to ILEC Transport, High Capacity Loops, Switching, and Broadband, and May Provide CLECs and States with Assurances for Reasonable Transitions from the Status Quo.*

For the UNEs listed below, the Commission should make a new determination of impairment finding based on the record evidence compiled in the triennial review and related proceedings.[10] Transport, high capacity loops, broadband facilities (specifically, those sought to be used for sending packetized transmissions), and switching should be "de-listed" because, as the record makes clear, carriers are not impaired without unbundled access to these elements in many, if not all, markets, depending on the facility. Unbundled network elements that are de-listed can either cease to be made available upon the effective date of the Commission's order,[11] or can continue to be made available

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[9] Without any statutory support for service-indifferent unbundling, carriers seeking to purchase ILEC facilities as UNEs for use in the provision of exchange access or long distance services must demonstrate that they are impaired in the provision of exchange access or long distance services without UNEs; no such finding has been made in the record of this or any other proceeding. Similarly wireless carriers must demonstrate that they are impaired in the provision of wireless services without access to ILEC UNEs. And in order to prevent regulatory gaming and arbitrage, and their resulting market distortions, the Commission must continue to exercise its demonstrated lawful authority to impose specific use restrictions on any UNE, or combination of UNEs, where necessary to prevent arbitrage. BellSouth supports efforts to supplement the Commission's current rules with rules that will achieve the same end but are designed to be easier for carriers to implement.

[10] In this letter BellSouth addresses the most critical unbundling issues; BellSouth's positions on other important open issues (for instance, POTS loops, signaling and call-related databases) are set out in its comments and reply comments.

[11] There is pertinent Commission precedent for this approach. When the Commission eliminated the switching UNE in certain markets in its 1999 *UNE Remand Order*, it provided the same mechanism of immediate transition to market-based rates. Similarly, when the Commission eliminated the operator services and directory assistance UNEs in the 1999 *UNE Remand Order*, the Commission imposed an obligation on ILECs to continue to provide these elements per its tariffs, finding that this essentially transition-free "outcome best comports with the realities of a growing . . . marketplace, embraces a deregulatory approach where justified, and does not unduly confine the entry strategies of competitive carriers." *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Third Report*

during a reasonable transition plan established by the Commission. If the Commission establishes a transition plan, it must specify the date on which the de-listed elements will only be made available to requesting carriers at market-based rates, or the date on which corresponding tariffed services will be made available at a wholesale discount for ultimate resale, as appropriate. Of course, in order for real commercial bargaining to reflect market forces, the Commission's current pick-and-choose rule must be taken off the books. That rule effectively precludes bargaining tailored to particular circumstances by making the piece parts of individual arrangements available to all carriers.

A. Transport and Loops

The extensive record compiled in this triennial review, and in related Commission proceedings, conclusively establishes that all transmission facilities at the DS-3 level or higher, whether last-mile "loop" or inter-office "transport," whether lit or dark, should be de-listed everywhere immediately. The empirical evidence establishes that competitors have sufficient traffic and revenue to deploy their own transport and loop transmission facilities at these highest capacities.[12] There is no public interest in maintaining a UNE requirement for these facilities any longer.

The record evidence also makes clear that high capacity transmission facilities below these highest levels should be de-listed immediately within certain MSAs and in other MSAs whenever the appropriate competitive triggers are met. The presence of operational CLEC fiber networks, and fiber-based collocators in MSAs within BellSouth's traditional customer markets alone, as shown in the attached maps, demonstrates the availability of competitive alternatives. These conditions illustrate that if competitive suppliers did not have to compete with an ILEC's regulatory imposed TELRIC-based offering, they would not have to be prodded into providing wholesale service. Allowing these multiple collocators and the ILECs to compete fairly in the wholesale market would ultimately result in a more efficient use of the networks, providing the collocators an income stream on underutilized facilities, and would develop a healthy wholesale market.

The record evidence supports the Commission's immediate de-listing of all DS-1 transport facilities in the top 100 MSAs. In areas outside of the top 100 MSAs, an appropriate competitive trigger for the future de-listing of DS-1 transport facilities is the presence of three or more facilities-based competitive transport providers in a wire centers at either end of a transport route. As recognized in the BellSouth-Time Warner regulatory compromise, competing carriers are simply not impaired without access to ILEC transport facilities when that amount of competition is present. Where ILECs can

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and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3892, ¶ 442 (1999) ("*UNE Remand Order*").

12 *See* UNE Fact Report at Section IV.

demonstrate that these conditions exist in MSAs where the Commission has not already de-listed this range of transport facilities, ILECs must be free to petition the Commission for relief from unbundling requirements. The Commission should then act promptly on the petition.

The Commission has already compiled an extensive record relevant to its unbundling determination for high capacity loops, which has been supplemented extensively in this proceeding. For any high capacity loop transmission facility below the DS-3 level, the appropriate competitive trigger would be the satisfaction of the Commission's Phase 2 Pricing Flexibility requirements for Channel Terminations to End-User Premises. The Commission has analyzed the data submitted by ILECs, such as BellSouth, considered the arguments against the data submitted by opponents of pricing flexibility, and has made the determination that its specific requirements have been met in a number of specific MSAs. The Commission has specifically granted Phase 2 Pricing Flexibility for Channel Terminations to End Users to BellSouth in 30 MSAs.[13]

To the extent the Commission retains an unbundling obligation for any of the underlying elements that can be used to provide special access services, the Commission must limit the use of those elements to providing local rather than special access service. The Commission's "safe harbor" and commingling constraints for loop-transport combinations have not only withstood legal challenge, the Commission's rationale for them has been endorsed by the DC Circuit as having a clear basis in the statute.[14] Because IXCs have successfully provided retail special access services for years, and because wireless carriers have successfully provided retail services without access to ILEC UNEs, these carriers cannot possibly carry their burden of proving a service-specific impairment as required by a more nuanced reading of the statute. Indeed, the

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[13] *In the Matter of BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-20, *Memorandum Opinion and Order*, 15 FCC Rcd 24588 (2000); *In the Matter of BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing No. 02-24, *Memorandum Opinion and Order*, DA 02-3228 (rel. Nov. 22, 2002).

[14] Some have proposed "commingling" special access and UNE facilities, provided that special access rates are "ratcheted." This kind of ratcheting would be both extremely expensive and fraught with operational and administrative problems. Further, it opens a significant opportunity for requesting carriers to exploit a ratcheting mandate for arbitrage in order to circumvent lawful obligations under existing special access tariffs and contracts. While BellSouth and other ILECs currently "ratchet" special access rates to account for that portion of special access facilities that are actually used for switched access, this is one of the most expensive and complex processes that BellSouth must administer in the exchange access environment. These problems would be exacerbated by mandatory special access or switched access to UNE ratcheting. In any event, the very nature of the competitive access market as demonstrated in the current record makes the legal basis for such a requirement doubtful, and certainly there is no evidence in the record for the Commission to depart from its findings in the *Supplemental Order Clarification*, recently upheld by the *CompTel* court.

Commission should establish that the local service safe harbor provisions apply not only to combinations, but to stand-alone loops and transport elements as well.

B. Advanced Services

This Commission has already and correctly observed, "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[15] The six-year history of Title II UNE regulation demonstrates that such regulation will brake investment and innovation, and will deter the Commission's efforts to fulfill Congress's advanced services deployment mandate. AT&T spoke for all of us when it observed, "[n]o company will invest billions of dollars to become a facilities-based . . . provider" if other companies "[that] have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others."[16] The Commission needs to recognize the truth of this declaration and signal the investment community its desire and plan to refrain from extending UNE requirements to ILEC facilities that are used in the provisioning of broadband services.

For this reason, BellSouth supports the High Tech Broadband Coalition's position that ILECs must not be required to provide unbundled access to any facility (lit or unlit) for a competitor's use in transmitting packetized information. This would facilitate packetized transmission over copper loops. Nor, as the HTBC shows, should ILECs be required to provide unbundled packet switching capability. New technology should not be regulated or it simply will not be placed, as noted by AT&T several years ago.[17]

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15 *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-33, 95-20 and 98-10, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3022, ¶ 5 (2002).

16 C. Michael Armstrong, *Telecom and Cable TV: Shared Prospects for the Communications Future*, delivered to the Washington Metropolitan Cable Club (Nov. 2, 1998).

17 *Id.* The Wireline Competition Bureau's recent order to suspend and investigate Verizon's recently filed "Packet At Remote Terminal Service" (PARTS) tariff, and Verizon's subsequent withdrawal of that tariff, are indicative of the stultifying effect regulation has on the placement of new technology Chairman Armstrong warned about. *In the Matter of Verizon Telephone Companies, Tariff FCC Nos. 1 & 11, Transmittal No. 232*, WC Docket No. 02-362, *Order Designating Issues for Investigation*, DA 02-3196 (rel. Nov. 18, 2002); Verizon Transmittal No. 266 (Nov. 26, 2002). In this instance, the Bureau found that Verizon's proposed pricing for packet transport was not priced in accordance with TELRIC methodology, and asked Verizon to review this pricing and justify why is wasn't priced at TELRIC rates. Because Verizon and other ILECs will have to expend substantial capital resources to equip Remote Terminal sites with packet technologies, mandatory use of TELRIC will absolutely discourage the ILECS from making this substantial investment in Packet Technology at Remote Terminal sites.

The Commission should immediately de-list broadband and new advanced services facilities upon a showing within any MSA that non-ILEC competitors provide the majority of broadband and new advanced services. Concurrent with this de-listing, the Commission should declare ILECs non-dominant in the provision of broadband services. It should eliminate the Computer Inquiry obligation on broadband services, and allow ILECs to provide stand-alone broadband transmission service on a private carriage basis, rather than as common carriage. All broadband services, including both bundled high-speed information service offerings and standalone transmission services, should be classified under Title I of the Communications Act. Even if the Commission were to classify some broadband services as common carriage under Title II, no unbundling obligation would be imposed in MSAs where there is significant intermodal broadband competition.

While line sharing should not be mandated under this approach, the FCC can encourage firms to offer it under negotiated terms and conditions. Moreover, the provision of wholesale "telecommunications" directly to CLECs in the form of DSL transport, under contract and at negotiated rates, separate and distinct from any "telecommunications service" that would be offered directly to the public, will inevitably occur as ILECs and cable companies compete for the wholesale data transport market.

C. Switching.

The Market. The empirical evidence demonstrates that carriers have succeeded in developing feasible alternatives for ILEC switching facilities throughout the country. 284 CLEC voice switches serve customers living in the nine southern states where BellSouth competes to provide local exchange service, as shown on the attached map. The evidence in the record establishes that self-provisioning is economically viable, that carriers unconstrained by ILEC switch architecture are free to place fewer switches to strategically serve much larger geographic areas, and that a wholesale market for switching has developed even as the scalability and functionality of new, inexpensive switches increases. Indeed, the BellSouth-Time Warner Telecom regulatory compromise explicitly recognizes that, at a minimum, CLECs are not impaired in the provision of switching to business customers due to the availability of competitive alternatives.[18]

The majority of the Commission already found in its 1999 *UNE Remand Order* that carriers are not impaired without access to unbundled switching in Density Zone 1 in the top 50 MSAs to customers with four or more lines, while at the time you would have

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[18] Letter from W.W. (Whit) Jordan, Vice President-Federal Regulatory, BellSouth to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 26, 2002) at 4. The BellSouth Time Warner proposal did not address the continued availability of unbundled switching for residential end users, but rather left the parties free to advocate their own positions.

been prepared to leave switching off the unbundling list for the provision of service to all customers in access Zone 1, regardless of their size or type, and regardless of whether the incumbent is providing enhanced extended links ("EELs"). Because the same switches serve both business and residential customers, switching should be de-listed immediately in all markets. The market should be allowed to work and to set efficient rates both for switching and for switching platform equivalent services.

Transition Assurances for CLECs and States. Concerns have been raised that, notwithstanding the evidence of a competitive market for switches, a CLEC's ability to interconnect with switches will be affected by the costs of transport and collocation. In the first instance, the appellate courts have made clear that the Commission's impairment analysis must consider only those cost differences that – when weighed against the cost advantages enjoyed by CLECs – render an element "unsuitable for competitive supply."[19] Effective competition does not require competitors to have identical costs for every input. Advantages in the cost or quality of a particular input functionality may be offset by countervailing advantages with respect to some other aspect of service provisioning. CLECs possess many such countervailing advantages, including the ability to target the most profitable customers and services, use the best available technology without regard to the inefficiencies resulting from an embedded legacy network, and offer any service they wish.[20]

Second, BellSouth has demonstrated, and the factual record in this proceeding is clear, that its hot cut performance is exemplary and that it is capable of handling bulk migrations.[21] All of BellSouth's states have approved collocation rates and charges set at TELRIC in place and BellSouth has refuted unfounded and vague CLEC allegations of alleged high costs of collocation.[22] BellSouth has also demonstrated to the Commission that competitive carriers can take advantage of existing technologies to groom efficiencies into their networks and therefore minimize the costs of transport.[23] It is, therefore, not appropriate to continue the unbundling requirement for switching predicated upon these alleged cost disadvantages, and any disadvantages that are

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19 *USTA* at 427.

20 *See id.* at 423.

21 *See* Affidavit of Kenneth L. Ainsworth and W. Keith Milner on Behalf of BellSouth Telecommunications Inc. ("BellSouth"), Attachment 6 to BellSouth Reply Comments; BellSouth Reply Comments at 32-37; letters from W. W. (Whit) Jordan, Vice President-Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 31, 2002, Oct. 15, 2002, and Sept. 27, 2002); letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 7, 2002).

22 BellSouth Reply Comments at 15-22.

23 *See* letter from W. W. (Whit) Jordan, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 25, 2002).

perceived are simply those that are "universal as between new entrants and incumbents in *any* industry."[24] As the court stated in *USTA*, a critical error in the Commission's twice-vacated unbundling mandate was its failure "to pin 'impairment' to cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful."[25] Costs associated with hot cuts, collocation, and transport in the highly competitive transport market are not characteristic of those that would make competitive deployments wasteful.

In any event, CLECs and states can receive assurances of practical and economical connections to centralized switches within a reformed regulatory framework that is grounded in the Act, faithful to the appellate court decisions, and conducive to capital investment. In the first place, to the extent in any market the Commission determines that competitors are impaired in their ability to provide local exchange service in competition with ILECs without access to the ILECs' unbundled transport network elements, the EEL (with local usage restrictions) will remain available to these competitors at rates prescribed by the states pursuant to the Commission's guidelines. Of course, BellSouth and others have demonstrated that the markets for switched and special access are highly competitive, and have been for decades. But even where transport relief is granted, as shown below, competitors can minimize even the "universal" cost disadvantages between "new entrants and incumbents in any industry." Further, states already play a critical role in overseeing the implications of these market factors, and can continue to play critical role in managing, locally, any "switch-delisting transition" plan this Commission deems to be in the public interest.

First, CLECs may make more efficient use of their existing transport facilities by purchasing concentration products from the open market. CLECs can use available GR303-based concentration products in their own collocation spaces to achieve an even higher level of concentration than that obtained from TR008-based products.[26] And in markets where transport relief is granted, but where competitors remain impaired without access to voice grade loops, a limited exception to the current restrictions against

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24 *Id.* at 427 (emphasis in original).

25 *Id.*

26 To the extent ILECs themselves have already deployed concentration equipment in their end offices, CLECs can also obtain concentration, and thus cost, efficiencies from the ILEC without having to collocate in the end office. Because there are competitive markets for this equipment, and because of the competitive nature of the transport market in general, it is vital, however, that the Commission not mandate ILEC placement of new concentration facilities, especially without providing for the ILEC's ability to recover its cost of capital in the equipment. ILECs would not ordinarily place this equipment in their end offices, nor use it following a carrier's decision to discontinue its use of it. ILECs must therefore be able to seek commercially reasonable assurances from customers that request such installations that the ILEC will be able to recover its investment.

commingling could be recognized to the extent it would allow CLECs to connect voice grade loop UNEs to market-priced interoffice transport where the CLEC can self-certify that its voice grade loops carry at least 51% local traffic.[27]

Second, should the Commission in its judgment allow for a transition period to implement its decision to de-list switching, states are free to address concerns (which are largely based on speculation) about ILECs' ability to timely and efficiently handle large quantity cutovers from switching (including UNE-P) UNEs to alternative sources. States in general have already established benchmarks for hot cut performance, collocation rates, and other terms and conditions of local interconnection. All states in which BellSouth provides local exchange service have adopted relevant performance measures and have implemented workshops and performed other oversight responsibilities that can easily be applied to "bulk transfers." The states can and will continue to play an important role in assuring that these requirements are met during any transition. It is critical, however, that the FCC alone retains and exercises its lawful authority to make the ultimate unbundling determination and to prescribe the length of any transition period.

This federal-state partnership is fully in accord with the Act's requirement that the FCC must preempt any state unbundling obligations that exceed the Commission's own. The Supreme Court required the Commission to limit unbundling, but doing so at the federal level while permitting the states to create additional inconsistent unbundling obligations would wholly undermine any such limitation. Under this proposal, the Commission will have made the essential determination of unbundling obligations, a mandatory duty imposed by Congress. The states may, based on local conditions, issue locally applicable rules that are "consistent with the requirements"[28] established by the Commission and that "would not substantially prevent implementation" of the Commission's unbundling determination.[29] Because the transitional period will be finite, and because states that choose to establish their own bulk transfer requirements

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27 It is critical that the Commission's existing local use restrictions be maintained; however, to the extent that a simpler and more manageable way to implement them can be found, the Commission should supplement them. Recently Qwest proposed three alternatives for determining local usage. Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 14, 2002) at 19. BellSouth in turn submits that an additional criterion based on Qwest's proposal be added to the current criteria: A CLEC may self-certify that its loops and transport carry at least 51% "local" traffic. In order to qualify as "local," a local telephone number must be associated with the loop and transport combination, which in turn must terminate in a CLEC collocation arrangement; the CLEC must maintain and provide usage recordings for the specific circuit; the ILEC and CLEC must connect through local interconnection trunks and ILEC and CLEC end users must be able to make local calls to and from the telephone number over these local interconnection trunks.

28 47 U.S.C. § 251(d)(3)(B).

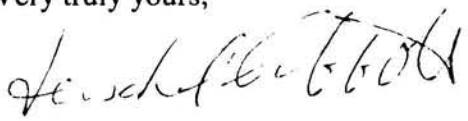
29 47 U.S.C. § 251(d)(3)(C).

will be limited, under the Act, to the requirement of "consistency," state-established transitional measures will not "substantially prevent implementation" of the Commission's switching determination.

And in any event, whatever the terms and conditions for bulk transfer migrations that may exist or be established, cost disadvantages can be further minimized by ILEC assurances to continue to bill CLECs at the existing UNE or UNE-P rate as appropriate whenever ILECs fail to migrate circuits during the transition period for any reason that is not the fault of the CLEC.

In sum, the Commission must seize this opportunity to reassess its over-broad and twice-vacated unbundling regime, and to recalibrate it in light of the massive empirical evidence comprising the existing record, the Commission's own conclusive findings in the context of its pricing flexibility and advanced services dockets, the teachings of the United States Supreme Court and the United States Court of Appeals, and the plain language of the statute. If it implements targeted unbundling reform consistent with these developments and the law, it will go a long way toward finally bringing about the kind of robust facilities-based competition envisioned by the Act, enabling multiple competitors in a healthy market to bring true choice and service differentiation to the public.

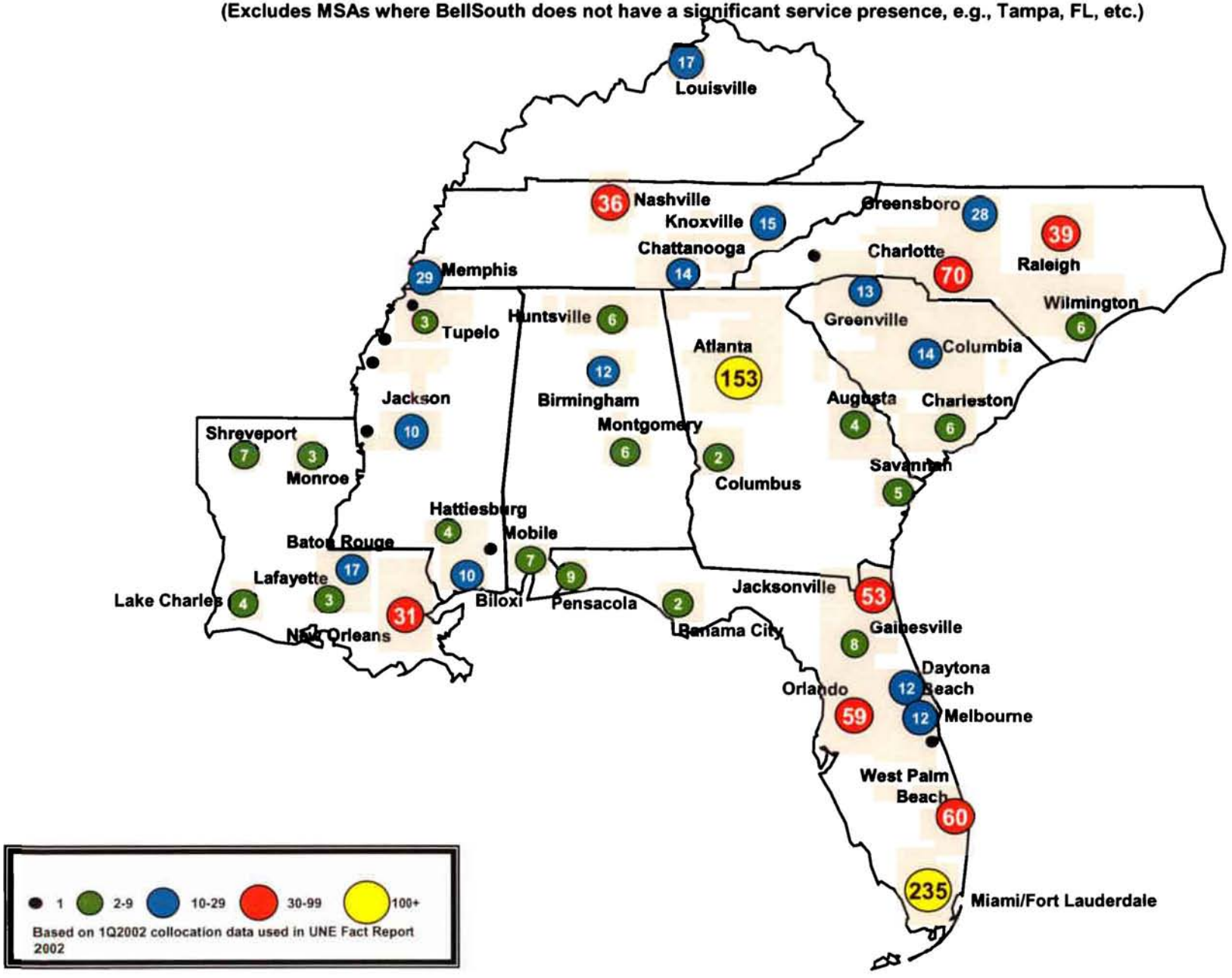
Very truly yours,



Herschel L. Abbott

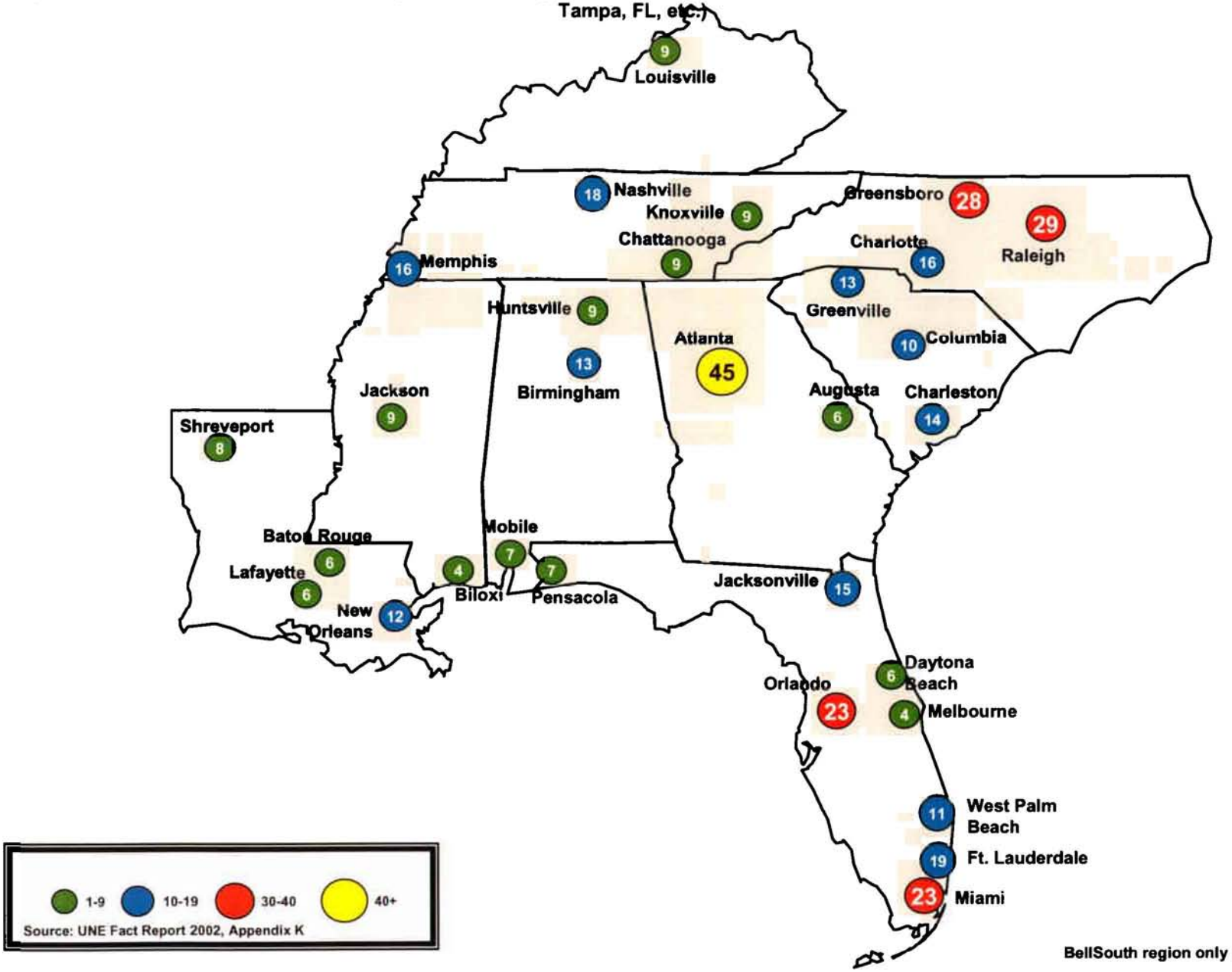
Fiber-Based Collocation by MSA

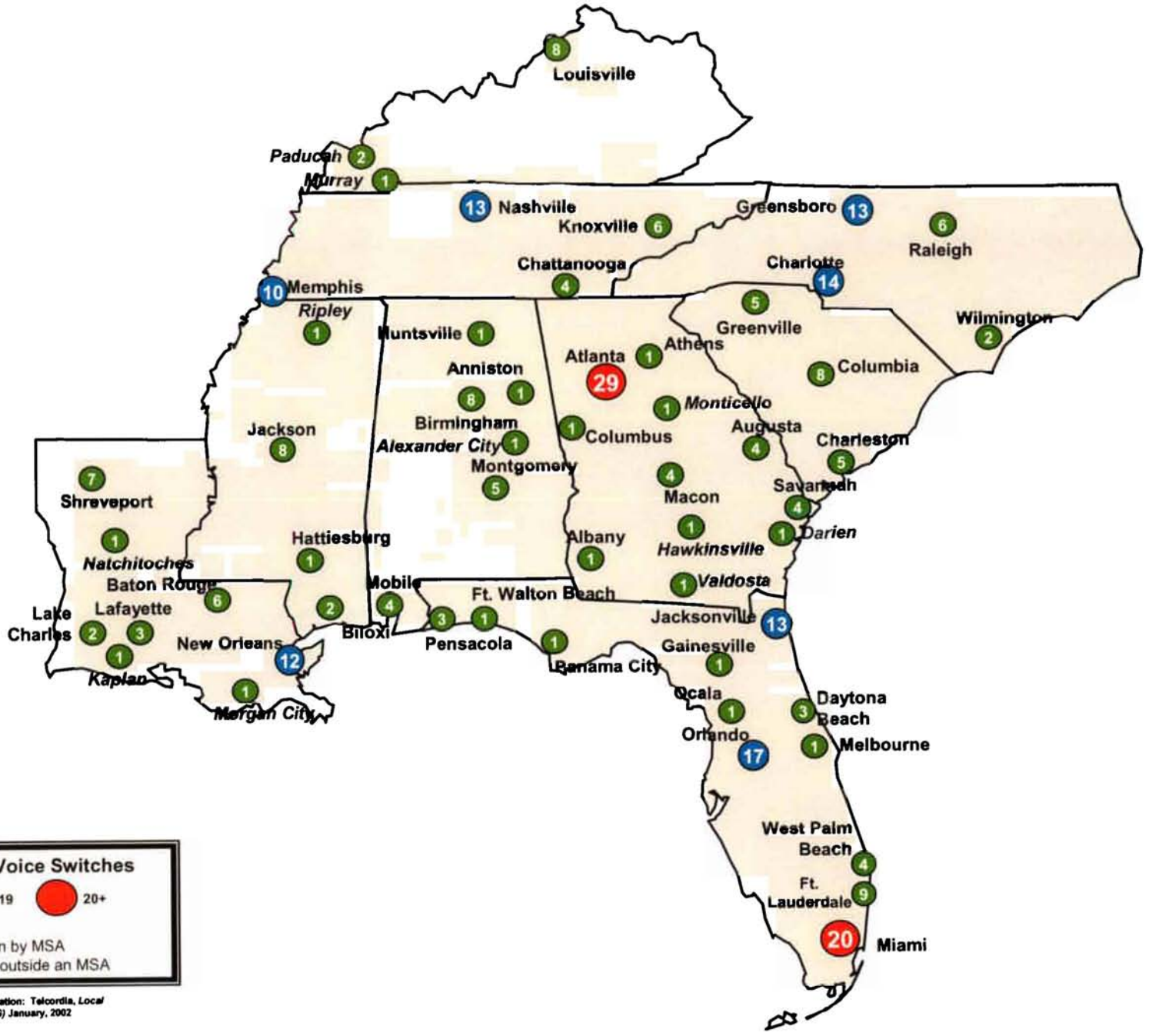
(Excludes MSAs where BellSouth does not have a significant service presence, e.g., Tampa, FL, etc.)



Operational CLEC Fiber Networks by MSA

(BellSouth MSAs Ranked in National Top 150, excluding MSAs where BellSouth does not have a significant service presence, e.g., Tampa, FL, etc.)





Source for CLEC Switch Information: Telcordia, *Local Exchange Routing Guide (LERG)* January, 2002